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Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

MADERO DEVELOPMENT AND CONSTRUCTION
COMPANY, INC., a Texas Corporation, and
CHAPARRAL EQUITY CORPORATION,
a Texas Corporation,
Petitioners,

v

CITY OF EL PASO, TEXAS,
a Municipal Corporation, and
CITY PLAN COMMISSION,
Respondents.

On Petition for Writ of Certiorari to
The Court of Appeals of Texas,
Eighth District, El Paso, Texas

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. When a landowner has successfully shown that through regulations effecting density, a land use regulator has deprived the owner of all economically viable use of his property and therefore destroyed the owner's reasonable, investment-backed expectations, without compensation in violation of the 5th Amendment to the United States Constitution, is it consistent with prior decisions of this Court to:
 - A. Hold that in order for such case to be "ripe" for judicial review, the landowner must first attempt to obtain a variance in the density restrictions from the land use regulator when the regulator has no authority to grant such a variance?
 - B. Hold that the "ripeness" requirement of justiciability can never be satisfied unless the land owner attempts to obtain a variance?
 - C. Fail to consider the non-jurisdictional, "prudential", aspects of ripeness?
2. Is it consistent with prior decisions of this Court for lower courts to determine whether it would be futile for the landowner to seek variance based upon a rigid application of the *Williamson* variance requirement without regard to whether such variance could in fact be granted?
3. Is it consistent with this Court's hold in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 107 S. Ct. 2378, 96 L.Ed.2d 250 (U.S. 1987), wherein it was held that all takings, including temporary ones, require the payment of just compensation; to require a property owner to seek a variance before being entitled to the payment of compensation?

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PETITION FOR WRIT OF CERTIORARI

The Petitioners MADERO DEVELOPMENT AND CONSTRUCTION COMPANY, INC. ("Madero") and CHAPARRAL EQUITY CORPORATION ("Chaparral Equity"), respectfully pray that a Writ of Certiorari issue to review the Judgment of the Supreme Court of Texas entered June 19, 1991.

OPINIONS BELOW

The Order of the Supreme Court of Texas denying Petitioners' Motion for Rehearing (Appendix B) is reported at 34 Tex. Sup. Ct. J. 36. The Opinion of the Court of Appeals, Eighth District of Texas (Appendix A) is reported at 803 S.W.2d 396. The Judgment of the 243rd Judicial District Court of El Paso County, Texas appears in Appendix C.

JURISDICTION

This case involved a regulatory taking of approximately 33 acres of undeveloped land known as Madero Hills. Following over 15 years of Petitioners' attempts to develop Madero Hills, the City of El Paso voted to include Madero Hills in the Planned Mountain Development ("PMD") zoning ordinance effectively depriving Petitioners of all economically viable use of such property.

Petitioners instituted inverse condemnation proceedings in Federal district court alleging, among other things, that the actions of the City of El Paso in including Madero Hills in the PMD were unconstitutional in that such actions deprived Petitioners of their property without compensation in violation of the 5th and 14th Amendments to the United States Constitution. On December 21, 1988, the Federal district court granted the City of El Paso's Motion for Summary Judgment dismissing Petitioners' claims as unripe. In January, 1989, Petitioners refiled their action in state district court and on August 2, 1989, following a two week jury trial, the trial court granted judgment for Petitioners and awarded Petitioners \$871,200 in damages. On January 4, 1991, the Court of Appeals for the Eighth District, El Paso, Texas reversed the judgment of the trial court and dismissed Petitioners' claims as unripe. Petitioners' Application for Writ of Error to the Texas Supreme Court was denied on June 19, 1991. On September 5, 1991, the Texas Supreme Court denied Petitioners' Motion for Rehearing. The Jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (1988).

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part as follows:

No person shall * * * be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment to the United States Constitution provides in pertinent part as follows:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law * * *

Pertinent provisions of the City of El Paso Ordinances and Texas Local Government Code are attached hereto as Exhibits "D" and "E" respectively.

STATEMENT OF THE CASE

Richard G. Miller, principal stockholder of Chaparral Equity, purchased approximately 100 acres of real estate known as "Crazy Cat Mountain" in the late 1960s. Crazy Cat is geologically described as the "Crazy Cat Landslide" which fell off the adjacent Franklin Mountains millions of years ago. The Franklin Mountain range lies within the El Paso City limits descending to the Rio Grande River creating the "Pass of the North." The purchased real estate and the surrounding developments were zoned R-3. Chaparral Equity initiated the Sierra Crest Subdivision development in 1975 by requesting

a rezoning to PUD-1, a planned unit development by special permit. Approximately 67 acres of the real estate tract located on the top and sides of the hill was rezoned and subsequently developed into streets and 113 single family lots.

Rolando Madero, principal stockholder of Madero Development and Construction Company, Inc., a Mexican born and educated engineer and architect, served as Mr. Miller's subdivision designer. With the assistance of his family, Mr. Madero purchased the remaining approximately 33 acres of Crazy Cat Mountain in 1979 with the intention of developing Madero Hills. Madero Hills lies on the identical slope as the above Sierra Crest Subdivision.

The R-3 zoning classification in the adjacent established Kern Place neighborhood permitted lots as small as 50 feet wide by 120 feet in depth. R-3 zoning classification permits a density of approximately 5.8 single-dwelling units per acre or a total of 174 lots for Madero Hills. Mr. Madero designed Madero Hills into 79 residential lots with a street running down the middle of the subdivision tract.

Mr. Madero over a period of five and one-half years spent considerable time, effort and money in filing for and obtaining the City of El Paso's approval of a master plan, preliminary approval of a four phase development, final approval of the first phase, and approval of a grading permit. During Mr. Madero's development efforts, it was not uncustomary for Respondents to change the rules or invent new obstacles not required of other developers. For instance, the final approval for the Unit One was granted subject to twenty-four conditions, many

of which had never been imposed on a residential subdivision in El Paso and would have been impossible to accomplish.

As early as 1982, the El Paso City Council decided to create a more restrictive mountainside zoning classification. Subdivisions under development, however, including Madero Hills would be exempt from this new classification. The new zoning classification was finally passed as Ordinance 8226 by the El Paso City Council on December 4, 1984, and was known as the Planned Mountain Development or "PMD." The stated purpose of the PMD was to directly correlate the density of the proposed development to the slope of the proposed development based upon two self-executing tables.

To circumvent the original planned exemption of Madero Hills from the PMD required a very deliberate scheme by which Respondents falsely terminated prior approvals and disseminated incorrect information. For instance, the planning department declared the grading permit revoked whereas the city engineer stated the permit was still active. Another example was that the cloth plat map had been submitted and signed by the city engineer but not distributed by the city personnel to the other city offices for processing. Ultimately, apparently feeling the pressures from adjacent land owners to preserve Madero Hills as a scenic easement, on January 14, 1986, the El Paso City Council passed Ordinance 8561 changing the Madero Hills zoning classification from R-3 to PMD over the objections of the Petitioners. City Council members and staff acknowledged that there was no consideration given to Petitioners' economic investment and reasonably invest-

ment backed expectations when Madero Hills was rezoned.

Following the inclusion of Madero Hills in the PMD, the city staff acknowledged that the slope of Madero Hills was forty-eight percent (48%) or an equivalent of a twenty-five degree (25°) angle. Through the self executing character of the PMD ordinance, the number of residential units capable of being developed on Madero Hills was reduced from 174 to seven multi-family dwellings units or 11 single-family dwelling units. It was not economically feasible to subdivide Madero Hills into only eleven lots.

Uncontroverted testimony and evidence in the lower court established that it would have been futile for the Petitioners to have received any further relief from the El Paso City Council. In addition to the clearly deliberate attempts to include Madero Hills into PMD, city council members testified regarding their expressed viewpoint that the city did not want anything on Madero Hills. Additionally, under the present statutory authority the Zoning Board of Adjustment ("ZBA") lacks the legal authority to change the expressed specific limitations of the PMD ordinance.

In January of 1989, Petitioners instituted this action against the City of El Paso and the City Zoning Commission (hereinafter sometimes collectively referred to as the "City of El Paso") in state court. Following a two week trial, the jury and the judge (independently) found that the City of El Paso had deprived Madero and Chaparral Equity of their property in violation of the Texas Constitution as well as the United States Constitution and awarded Petitioners \$871,200 in damages.

The Court of Appeals reversed the trial court judgment and dismissed Petitioners' claims for want of jurisdiction on the basis of ripeness. In a two to one decision in which each justice wrote his own opinion, the Court of Appeals found:

1. Ripeness to be jurisdictional and not subject to waiver;
2. Petitioners' claims were not "ripe" for review because Petitioners had not sought a variance; and,
3. Petitioners could not invoke the "futility exception" without first seeking a variance.

On February 21, 1991, Petitioners filed their application for writ of error with the Texas Supreme Court. On June 19, 1991, such application was denied and on September 5, 1991 the Texas Supreme Court denied Petitioners' Motion for Rehearing.

REASONS FOR GRANTING THE PETITION

Introduction

Between 1981 and 1987, this Court decided several cases involving inverse condemnation.¹ These decisions, however, have not resolved many of the issues surrounding taking claims². In *First English*³, a case in which

1. *San Diego Gas & Electric Company v. City of San Diego*, 450 U.S. 621, 101 S. Ct. 1287, 67 L.Ed.2d 551 (U.S. 1981); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S. Ct. 3164, 73 L.Ed.2d 868 (U.S. 1982); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 104 S. Ct. 2862, 81 L.Ed.2d 815 (U.S. 1984); *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S. Ct. 3108, 87 L.Ed.2d 126 (U.S. 1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 106 S. Ct. 2561, 91 L.Ed.2d 285 (U.S. 1986); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 107 S. Ct. 1232, 94 L.Ed.2d 472 (U.S. 1987); *Hodel v. Irving*, 481 U.S. 704, 107 S. Ct. 2076, 95 L.Ed.2d 668 (U.S. 1987); *First English Evan-*

the property owner did not seek to obtain a variance from the land use restrictions prior to instituting an inverse condemnation action⁴, this Court held that any taking, no matter how temporary, required compensation to be paid to the property owner. In disregard to such ruling, lower courts, including the appellate court in the instant action, continue to dismiss claims as unripe where the property owner has not sought a variance.⁵ No matter whether the regulation as a whole is ultimately invalidated as denying all reasonable use, or whether, through a variance, the regulation is invalidated as to a particular land owner; the fact that a taking has occurred in both situations mandates the payment of just compensation.

Additionally, in contrast to this Court's ad hoc factual resolution of ripeness, lower courts have adopted a mechanistic approach. In order to establish that his taking claim is ripe, lower courts require a property owner to

gelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 107 S. Ct. 2378, 96 L.Ed.2d 250 (U.S. 1987); *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S. Ct. 3141, 97 L.Ed.2d 677 (U.S. 1987).

2. As evidenced by the fact that in the present term, this Court has granted writ of certiorari in two inverse condemnation cases and in three eminent domain cases. *Yee v. City of Escondido*, 112 S. Ct. 294 (October 15, 1991); *PFZ Properties, Inc. v. Rodriguez*, 60 U.S.L.W. 3082 (Nov. 12, 1991); *Lucas v. South Carolina Coastal Council*, 60 U.S.L.W. 3208 (Nov. 18, 1991).

3. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 107 S. Ct. 2378, 96 L.Ed.2d 250 (U.S. 1987).

4. See Petition for Writ of Certiorari, *Lake Nacimiento Ranch Co. v. County of San Luis Obispo, California*, No. 87-2104, page 20.

5. See *Zibler v. Town of Moraga*, 692 F.Supp. 1195, 1197-1202 (N.D. Calif. 1988); See also *Shelter Creek Development Corp. v. City of Oxnard*, 838 F.2d 375 (9th Cir. 1988); see also *Lake Nacimiento Ranch Co. v. San Luis Obispo Cty.*, 841 F.2d 872 (9th Cir. 1987); see also *Del Monte Dunes at Monterey, Ltd. v. County of Monterey*, 920 F.2d 1496, 1501 (9th Cir. 1990).

first have filed for and been rejected both a permit as well as variance application.⁶

Although this Court has never addressed the application of the futility exception, lower courts seem settled on the proposition that a property owner must first seek both a permit as well as a variance application before the futility exception can be invoked.⁷ Such requirements destroy totally any viable use of the futility exception and mandate the futile act which the futility exception was created to avoid.

Finally, in addressing both the futility exception as well as ripeness, lower courts have consistently held ripeness to be jurisdictional and not subject to waiver.⁸ Such holding is in stark contrast to the two prong ripeness test elaborated by this Court in *Abbott*.⁹

This case provides the unique opportunity for this Court to resolve all of the above stated inconsistencies

6. See *Unity Ventures v. County of Lake*, 841 F.2d 770 (7th Cir. 1988); see also *Kinzli v. City of Santa Cruz*, 818 F.2d 1449, *opinion amended by*, 830 F.2d 968 (9th Cir. 1987), *cert. denied*, 484 U.S. 1043, 108 S. Ct. 775, 98 L.Ed.2d 861 (U.S. 1988); see also *Shelter Creek Development Corp. v. City of Oxnard*, 838 F.2d 375 (9th Cir. 1988); see also *Lake Nacimiento Ranch Co. v. San Luis Obispo Cty.*, 841 F.2d 872 (9th Cir. 1987).

7. See *Zibler v. Town of Moraga*, 692 F.Supp. at 1197-1202; *Kinzli v. City of Santa Cruz*, 818 F.2d 1449, *opinion amended by*, 830 F.2d 968 (9th Cir. 1987), *cert. denied*, 484 U.S. 1043, 108 S. Ct. 775, 98 L.Ed.2d 861 (U.S. 1988); see also *Shelter Creek Development Corp. v. City of Oxnard*, 838 F.2d 375 (9th Cir. 1988); see also *Lake Nacimiento Ranch Co. v. San Luis Obispo City*, 841 F.2d 872 (9th Cir. 1987).

8. See, e.g., *Samaad v. City of Dallas*, 940 F.2d 925, 934 (5th Cir. 1991); *Sinola Lake Owners Association v. City of Simi Valley*, 846 F.2d 1475, 1480 (9th Cir. 1989); *Neiderhiser v. Borough of Berwick*, 840 F.2d 213, 216 (3d Cir. 1988).

9. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 87 S. Ct. 1507, 18 L.Ed2d 681 (U.S. 1967).

and to provide the guidance both property owners as well as land use regulators need to effectively manage taking related issues.

**WHETHER OR NOT A VARIANCE CAN BE
OBTAINED IS IRRELEVANT TO THE
DETERMINATION OF WHETHER A
TAKING HAS OCCURRED**

In *Williamson*¹⁰ and *McDonald*¹¹, this Court refused to review taking claims on the basis that the property owner had an opportunity to obtain a variance from the the zoning authorities that would permit the development of the property to proceed. Implicit in these holdings was the assumption that the temporary deprivation of all use of property would not constitute a taking if it could be adequately remedied by a later approval of the developer's plans.¹²

Applying the perceived rational of *Williamson* that all taking claims were unripe without a property owner first seeking a variance from the land use restrictions, lower court's, in a majority of cases, have dismissed taking claims as being premature where such variance had not been sought.¹³ In 1987, this Court rendered

10. *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S. Ct. 3108, 87 L.Ed.2d 126 (U.S. 1985).

11. *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 106 S. Ct. 2561, 91 L.Ed.2d 285 (U.S. 1986).

12. See *First English Evangelical Luthern Church v. County of Los Angeles*, 482 U.S. 304, 333, 107 S. Ct. 2378, 2396, 96 L.Ed.2d 250 (U.S. 1987) (Stevens, J., dissenting).

13. See, e.g., *Executive 100, Inc. v. Martin County*, 922 F.2d 1536, 1540 (11th Cir.), cert. denied, _____ U.S. _____, 112 S. Ct. 55 (U.S. 1991); *Unity Ventures v. County of Lake*, 841 F.2d 770

its decision in *First English* wherein it was held that temporary regulatory takings which deny a landowner all use of his property, are not different in kind from permanent takings for which the Constitution clearly requires compensation.¹⁴

In *First English*, the landowner did not seek to obtain a variance from the zoning authorities but instead proceeded to immediately institute an inverse condemnation action.¹⁵ The temporary regulatory taking discussed in *First English* is in substance identical to that which is present in the case at bar.

Here, the interaction of the variance procedure and inverse condemnation procedure has the property owner chasing his own tail, so to speak, and never having a real opportunity for relief. The ZBA had jurisdiction to grant a variance only if application of the PMD zoning effected a taking.¹⁶ But if the effect was already that severe, then, under *First English*, compensation was already owed. The only thing that any later governmental action could do would be to mitigate the damages by converting a permanent taking into a temporary one. Thus the appellate determination below, which held that

(7th Cir. 1988); *Kinzli v. City of Santa Cruz*, 818 F.2d 1449, opinion amended by, 830 F.2d 968 (9th Cir. 1987), cert. denied, 484 U.S. 1043, 108 S. Ct. 775, 98 L.Ed.2d 861 (U.S. 1988); *Littlefield v. City of Afton*, 785 F.2d 596 (8th Cir. 1986).

14. See *First English*, 482 U.S. at 318, 107 S. Ct. at 2388.

15. See Petition for Writ of Certiorari, *Lake Nacimiento Ranch Co. v. County of San Luis Obispo, California*, No. 87-2104, page 20.

16. See Tex. Rev. Civ. Stat. Ann. art. 1011g now codified as Tex. Local Government Code § 211.009(a)(3) authorizes the ZBA to grant variances only where "... a literal enforcement of the ordinance would result in unnecessary hardship . . ."; see also *Board of Adjustment v. Willie*, 511 S.W.2d 591 (Tex. Civ. App.—San Antonio 1974, writ ref'd n.r.e.) (art. 1011g requires denial of all reasonable use); El Paso Ordinance § 2.16.030 (1989).

the property owner had to go back to the ZBA for a variance before seeking compensation for a taking¹⁷ which had already occurred is in irreconcilable conflict with *First English*. The question of whether a variance can be granted is simply irrelevant to the determination of whether a taking has occurred. It is only a mitigation measure.

From the moment Madero Hills was placed into the PMD, the City of El Paso unconstitutionally deprived Petitioners of their property. Once such taking had occurred, the City of El Paso retained the whole range of options already available—amendment of the regulation, withdrawal of the invalidated regulation, of the exercise of eminent domain.¹⁸ No subsequent action, however, by the City of El Paso can relieve it of the duty to provide compensation for the period during which the taking was effective.

**LOWER COURTS HAVE IGNORED THIS
COURT'S CAREFUL EXPLANATION OF
THE "PRUDENTIAL" COMPONENT OF
"RIPENESS" BY TAKING THE EASIER
—AND ERRONEOUS—WAY OF
TREATING ALL "RIPENESS"
DECISIONS AS JURISDICTIONAL**

This Court's decisions make it clear that ripeness is *not* automatically a jurisdictional issue.¹⁹ Rather, this

17. *City of El Paso v. Madero Development Corporation, et al.*, 803 S.W.2d 396 (Tex. App.—El Paso 1991, writ denied) (attached hereto at Appendix A).

18. See *First English*, 482 U.S. at 321, 107 S. Ct. at 2389.

19. See *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 81, 98 S. Ct. 2620, 2635, 57 L.Ed.2d 595 (U.S. 1978); see also *Hotel Restaurant Employees Union v. Smith*, 846 F.2d 1499, 1516-1517 (D.C. Cir. 1988).

Court has held that the jurisdictional component of ripeness is merely a narrow aspect of the doctrine. The more fundamental role of the ripeness doctrine is to determine whether cases, which are within lower court's jurisdiction to consider, ought to be considered for prudential reasons.

Lower courts, including the state appellate court herein, have consistently used the concept of ripeness to avoid making decisions on the merits in taking cases.²⁰ Such courts have routinely held ripeness to be jurisdictional and dismissed taking claims, *sua sponte*.²¹ To justify "ripeness" as a jurisdictional concept, lower courts have, without exception, focused exclusively upon the *Williamson* finality requirement and ignored the policy considerations outlined by this Court in *Abbott*. The fact that ripeness includes both constitutional as well as policy or prudential considerations cannot be disputed. The prudential component of ripeness can be seen both in the futility exception to such requirement as well as in prior decisions of this Court.

Mootness, standing, ripeness and political question form the component parts to the Article III "case and controversy" constitutional doctrine of justiciability.²² Although nonjusticiability is not to be confused with the lack of jurisdiction over the subject matter,²³ the distinction between the two concepts has often been blurred.²⁴

20. See cases cited *supra* notes 5, 6, 8, 14.

21. See cases cited *supra* note 8.

22. See *Poe v. Ullman*, 367 U.S. 497, 504, 81 S. Ct. 1752, 1756, 6 L.Ed.2d 989 (U.S. 1961); see also *El Paso Electric v. Federal Energy Regulatory Commission*, 667 F.2d 462, 466 (5th Cir. 1982).

23. See *Baker v. Carr*, 369 U.S. 186, 82 S. Ct. 691, 7 L.Ed.2d 663 (U.S. 1962).

24. See *Mesolella v. City of Providence*, 508 A.2d 661, 665 (R.I. 1986).

Justiciability is a concept of uncertain meaning and scope.²⁵ This Court has previously stated that justiciability is not a legal concept with a fixed content or susceptible of scientific verification.²⁶ The doctrine has become a blend of the constitutional limitations imposed pursuant to Article III as well as restraints imposed based upon policy considerations.²⁷

This Court has recognized that all the component parts to justiciability include both jurisdictional as well as prudential concerns.²⁸ Referring to mootness, it has been said that the prudential component “. . . is a melange of doctrines relating to the court’s discretion in matters of remedy and judicial administration. Unlike Article III mootness, these doctrines address not the power to grant relief but the court’s discretion in the exercise of that power.”²⁹ Such concepts have been referred to as “prudential mootness”³⁰ and “prudential ripeness”.³¹

25. See *Flast v. Cohen*, 392 U.S. 83, 95, 88 S. Ct. 1942, 1950 20 L.Ed. 947 (U.S. 1968).

26. See *Poe v. Ullman*, 367 U.S. at 508.

27. See *Flast v. Cohen*, 392 U.S. at 97, 88 S. Ct. at 1951.

28. See, e.g., *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 81, 98 S. Ct. 2620, 2635, 57 L.Ed.2d 595 (U.S. 1978) (prudential considerations embodied in ripeness); *Allen v. Wright*, 468 U.S. 737, 751, 104 S. Ct. 3315, 3324, 82 L.Ed.2d 556 (U.S. 1984) (standing includes prudential concerns); *United States v. W.T. Grant Co.*, 345 U.S. 629, 73 S. Ct. 894, 97 L.Ed. 1303 (U.S. 1953) (mootness includes prudential considerations).

29. See *Chamber of Commerce v. United States Dept. of Energy*, 627 F.2d 289, 291 (D.C. Cir. 1980).

30. See *City of New York v. Baker*, 878 F.2d 507, 509 (D.C. Cir. 1989).

31. See *Hotel Restaurant Employees Union v. Smith*, 846 F.2d 1499, 1516-1517 (D.C. Cir. 1988).

Both the constitutional as well as the policy or prudential considerations involved in ripeness were discussed in the leading "ripeness" case of *Abbott*.³² In *Abbott*, this Court established a two prong test for determining whether a case was "ripe." First, the issues present must be fit for judicial decision.³³ The scope of this requirement is limited to the constitutional restraints imposed under Article III.

The second prong of the *Abbott* "ripeness" test focuses upon the hardships to the parties in withholding court consideration.³⁴ It is from this prong of the *Abbott* "ripeness" test from which the futility exception discussed by this Court in *Williamson* and *MacDonald* stems.³⁵ The futility exception is a creation of the prudential considerations outlined in the often quoted opinion of Justice

32. See *Abbott Laboratories v. Gardner*, 387 U.S. 136, 87 S. Ct. 1507, 18 L.Ed.2d 681 (U.S. 1967).

33. See *Abbott*, 387 U.S. at 149, 87 S. Ct. at 1515.

34. See *Abbott*, 387 U.S. at 149, 87 S. Ct. at 1515.

35. Beginning in 1974, California courts, both Federal and State began discussing a "futility exception" to the exhaustion of administrative remedies doctrine. In *Dahl v. City of Palo Alto*, 372 F.Supp. 647, 649 (N.D. Calif. 1974), the court, in response to the argument that the property owner had failed to exhaust administrative remedies stated that "It is highly improbable that a variance would or legally could, be granted where as much land as here is involved (291 acres) and where development would be completely contrary to the goal of preserving land in its natural or near natural state. The Court will not require such a useless course." (Citations omitted).

The *Dahl* exception to exhaustion of administrative remedies was referred to as the "futility exception" in *People v. Superior Court of County of Sonoma*, 91 Cal. App. 3d 95, 101-102 (Cal. Ct. App. 1979). Although discussed in the context of exhaustion of administrative remedies, it is clear that policy considerations dictate the application of the futility exception both in ripeness as well as exhaustion of administration remedies.

Brandies occurring in *Ashwander v. Tennessee Valley Authority*.³⁶

Without consideration of “prudential ripeness”, lower courts have been able to fashion a bright line test for ripeness. If the land owner has not sought both a variance as well as permit application, the land owners claim of taking is not ripe and as is the case before the Court here, the land owners claim is dismissed for want of jurisdiction. Such test avoids any real consideration of the finality required by *Williamson* and is merely a restatement of the exhaustion of administrative remedies test this Court held against in *Williamson*.

An analogous line of logic has been developed when considering the appellate court jurisdictional pre-requisite of finality contained within 28 U.S.C. § 1257. The finality requirement for appellate court jurisdiction, like the ripeness finality, has not been administered in a mechanistic fashion, rather at least 4 exceptions have been outlined by this Court in which finality does not have to be present.³⁷ These finality exceptions were created to avoid the “mischief of economic waste and of delayed justice.”³⁸ Prudential or policy considerations such as these as well as those developed concerning ripeness cannot be jurisdictional.

Subject matter jurisdiction, the basis upon which the Court of Appeals reversed and rendered in this cause,

36. *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 341-346, 56 S. Ct. 466, 482, 80 L.Ed. 688 (U.S. 1935).

37. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477, 95 S. Ct. 1029, 1037, 43 L.Ed.2d 328 (U.S. 1975).

38. *See Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124, 65 S. Ct. 1475, 1478, 89 L.Ed. 2092 (U.S. 1945).

unlike the justiciable concern of ripeness, cannot be waived.³⁹ Subject matter jurisdiction exists when the nature of the case falls within a general category of cases the court is empowered to adjudicate under applicable statutory and constitutional provisions.⁴⁰ The question of subject matter jurisdiction is determined from the face of the plaintiff's pleadings.⁴¹ It is intuitively obvious from the foregoing that while ripeness may be the yardstick by which courts determine whether to exercise their jurisdiction, ripeness is not and cannot be jurisdictional.

Basic to all jurisprudence is the idea that subject matter jurisdiction either exists or it does not exist. There is no gray area allowing trial courts to exercise subject matter jurisdiction when such jurisdiction is lacking. Ripeness, however, is determined by utilizing the two part *Abbott* test.⁴² Ripeness, therefore, unlike jurisdiction, requires the court to exercise its discretion to determine if judicial resolution would be desirable.⁴³

39. See *Bowman v. Howell*, 618 S.W.2d 913 (Tex. App.—Fort Worth 1981, no writ).

40. See *Bullock v. Briggs*, 623 S.W.2d 508 (Tex. App.—Austin 1981, writ ref'd n.r.e.), *cert. denied*, 457 U.S. 1135, 102 S. Ct. 2962, 73 L.Ed.2d 1352 (U.S. 1982).

41. See *Elbar, Inc. v. Claussen*, 774 S.W.2d 45 (Tex. App.—Dallas 1989, no writ).

42. See *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-149, 87 S. Ct. 1507, 18 L.Ed.2d 681 (U.S. 1967).

43. See *Brown v. Fero Corp.*, 763 F.2d 798 (6th Cir. 1985), *cert. denied*, 474 U.S. 947, 106 S. Ct. 344, 88 L.Ed.2d 291 (U.S. 1985).

**LOWER COURTS CONTINUE TO APPLY AN
EXHAUSTION OF ADMINISTRATIVE
REMEDIES TEST TO DETERMINE
RIPENESS AS A DEVICE FOR
AVOIDING DECISIONS ON
THE MERITS**

Exhaustion of administrative remedies can be viewed conceptually as a horizontal gradient consisting of varying degrees of finality. At one end of the exhaustion gradient, a process of administrative review is initiated while at the other end, administrative review culminates in an authoritative decision. In a land use context, administrative review is initiated through commission hearings and culminates when an application for variance is denied.

If exhaustion of administrative remedies is viewed as a horizontal gradient, the *Williamson* finality requirement can be represented by a vertical vector intersecting such gradient. At any point along the horizontal exhaustion plane, ripeness can be satisfied and vertical court review initiated, provided that exhaustion has surpassed the *Williamson* finality threshold.

In order to determine whether a specific point along the horizontal exhaustion gradient has surpassed the *Williamson* finality threshold, courts must investigate the facts. Such investigation will determine whether or not further steps along the horizontal exhaustion gradient are necessary before a "final" decision has been obtained. Contrary to investigating facts, however, lower courts have resorted to a one dimensional analysis based simply upon determining what point the property owner has reached along the exhaustion gradient. If further ad-

ministrative review is possible, the property owner's taking claims are dismissed for want of jurisdiction.

This analysis practiced by lower courts is merely a re-application of the exhaustion doctrine this Court held against in *Williamson*. Jurisprudential concerns, such as those embodied in the exhaustion doctrine, do not bear on whether a court has jurisdiction but only upon whether it should exercise that jurisdiction.⁴⁴ The City of El Paso raised only the affirmative defense of exhaustion of administrative remedies in its pleadings and failed to urge lack of ripeness until this cause was on appeal.⁴⁵ The state appellate court, without any discussion of prudential ripeness, held ripeness to be jurisdictional and dismissed Petitioners' claims for want of jurisdiction. The continued re-application of the exhaustion doctrine by the state appellate court in this action as well as other lower courts is contrary to the holdings of this court.

**MECHANISTIC APPLICATION OF FINALITY
TEST RESULTS IN LAND OWNER BEING
FORCED TO RESORT TO PIECEMEAL
LITIGATION AND OTHER UNFAIR
PROCEDURES**

This Court has previously stated that the finality element of ripeness is to be applied in a "pragmatic way".⁴⁶ "Basically, the question in each case is whether the facts

44. See *Association of National Advertisers, Inc. v. Federal Trade Commission*, 627 F.2d 1151, 1157 (D.C. Cir. 1979).

45. *City of El Paso v. Madero Development Corporation, et al.*, 803 S.W.2d 396 (Tex. App.—El Paso 1991, writ denied) (attached hereto at Appendix A).

46. See *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149, 87 S. Ct. 1507, 1516, 18 L.Ed.2d 681 (U.S. 1967).

alleged, under all circumstances, show that there is a substantial controversy, between the parties having adverse legal interests, of sufficient immediacy and reality to warrant" judicial intervention.⁴⁷ Thus, a regulatory action may be ripe for review notwithstanding the fact that such regulation has not been applied to anyone, if the expectation of such application causes cognizable injury.⁴⁸

In contrast to this Court's clearly pragmatic approach to ripeness, lower courts, including the appellate court in the case at bar, continue to consider only the finality prong of the *Abbott* ripeness test and refuse to consider the hardships that would be imposed upon property owners as a result of such ruling. Petitioners' plight is similar to that experienced by the land owners in each of the leading taking cases decided by this court over the past decade. For 15 years, Petitioners sought to develop Madero Hills. Feeling the constant pressure exerted by adjacent land owners to preserve Madero Hills as a scenic easement or add to the Mountain Park land, the City of El Paso embarked upon a series of maneuvers each designed to preclude further development of Madero Hills. Ultimately, the City enacted and placed Madero Hills into a PMD zoning ordinance, which through self executing density restrictions, reduced the maximum possible residential units on Madero Hills from 174 to 11. Development of Madero Hills at 11 residential units was not economically viable, therefor, the City had effectively preserved its easement without complying with the compensation requirements of the United States Constitution.

47. *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273, 61 S. Ct. 510, 512, 85 L.Ed. 826 (U.S. 1941).

48. See *Columbia Broadcasting Systems, Inc. v. United States*, 316 U.S. 407, 418-419, 62 S. Ct. 1194, 1200-1201, 86 L.Ed. 1563 (U.S. 1942).

Despite 15 years of attempted development, despite a clear expressed intent on the part of the City to preclude development, despite a deprivation of almost 2 million dollars in investment backed expectations, and despite the futility of any further attempts at development, the state appellate court held this matter to not be ripe. A land owner must ask himself how much he sacrifice and endure to retain the bundle of sticks the Constitution guarantees his land possesses.

After a two week trial, an El Paso jury found that Petitioners had been deprived their property without compensation in violation of the 5th Amendment to the United States Constitution. On appeal, the state appellate court, in often disjunctive and confusing opinion in which concepts of exhaustion of administrative remedies and ripeness were blended and misapplied, dismissed Petitioners' claims for lack of ripeness.

Seemingly following a recent trend in lower court decisions, the state appellate court held that a land owner must first attempt to obtain a variance from the land use regulation before his taking claim can satisfy the *Williamson* finality requirement and prior to invoking the *MacDonald* futility exception. It is difficult to imagine what purpose is fulfilled in requiring a land owner to first seek to obtain that which cannot be granted in order to satisfy a ripeness requirement.⁴⁹ Yet, in some what of a bonanza

49. This Court expressly stated in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S. Ct. 3108, 87 L.Ed.2d 126 (U.S. 1985) that "It appears that variances could have been granted to resolve at least five of the Commissioner's eight objections to the Plat". *Williamson* at 188. Additionally, in *Williamson*, the zoning board of adjustment could grant variances from the density requirements. *See Id.* Resorting to mechanically applying the *Williamson* finality rule ignores the

for land use regulators, lower courts have now imposed such a requirement.

Recent taking decisions of this Court construing the ripeness requirement have fashioned as a shield to taking claims a defense of finality. This shield was premised upon the principles of justiciability, judicial economy and other constitutional prudential considerations. The shield, however, was not impenetrable. If further attempts at development would be futile, a land owner could immediately seek compensation.

The shield of finality, however, has now been transformed by lower courts into a mighty sword with which land use regulators can consistently defeat even the most egregious of taking claims. Clearly, this Court did not intend to forge even more obstacles and barriers to taking claims through its decision in *Williamson*.

**RESTRICTING APPLICATION OF FUTILITY
EXCEPTION TO ONLY CASES WHERE BOTH
PERMIT AND VARIANCE APPLICATION
HAVE BEEN SOUGHT AND REJECTED,
DESTROYS SUCH EXCEPTION**

"Ripeness" can be satisfied by showing that a landowner's attempts at development would be futile.⁵⁰ This futility exception eliminates any requirement that a landowner must resort to piecemeal litigation or otherwise unfair procedures in order to show finality.⁵¹ Although this

reason for the creation of such rule. If the land use regulators cannot grant the property owner any relief, then the reason for the creation of the *Williamson* finality rule has ceased; consequently, such rule should also cease.

50. *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 351 n.7, 106 S. Ct. 2561, 91 L.Ed.2d 285 (U.S. 1986).

51. *See Id.*

Court has never addressed the application of the futility exception, lower court's have all but curtailed any possible application. While the U.S. Claims Court has taken a pragmatic view of this issue, insisting on a close examination of the facts and governmental demonstration of what else a property owner could *meaningfully* do to "finalize" a decision,⁵² many other courts treat the issue as a talismanic one. These latter courts arbitrarily require all property owners to jump through identical hoops, regardless of whether they offer any real opportunity at relief.⁵³ This judicially created paradox mandates the precise conduct the futility exception was created to avoid.⁵⁴

In the opinion below, the State appellate court adopted the futility exception paradox. Such requirement totally contradicts the essence of the futility exception as embodied in the prior decisions of this Court. The lower court's holding that this case was not ripe was predicated solely on the basis that Petitioners were obligated to seek a variance which may have increased the density of lots permitted, thereby identifying the "degree of taking" for damage calculations. While pursuit of a variance may be required in some cases, there is no obligation to seek a variance where relief cannot be granted.⁵⁵ Uncontroverted testi-

52. See *Florida Rock Canyon Indus., Inc. v. United States*, 21 Cl. Ct. 161 (Cl. Ct. 1990); *Formanek v. United States*, 18 Cl. Ct. 785 (Cl. Ct. 1989); *Beure-Co. v. United States*, 16 Cl. Ct. 42 (Cl. Ct. 1988); *Loveladies Harbor, Inc. v. United States*, 15 Cl. Ct. 381 (Cl. Ct. 1988).

53. See *Zibler v. Town of Moraga*, 692 F.Supp. 1195, 1197-1202 (N.D. Calif. 1988).

54. See *Berger, The "Ripeness" Mess in Federal Land Use Cases or How the Supreme Court Converted Federal Judges into Fruit Peddlers*, Ch. 7, Southwest Legal Foundation Institute of Planning, Zoning, and Eminent Domain 21st Annual Meeting (1991).

55. See *Herrington v. County of Sonoma*, 857 F.2d 567, 570 n.2 (9th Cir. 1988), *cert. denied*, 489 U.S. 1090, 109 S. Ct. 1557, 103 L.Ed.2d 860 (U.S. 1989).

mony and evidence in the lower court established that it would have been futile for the Petitioners to have received any further relief from the El Paso City Council. In addition to the clearly deliberate attempts to include Madero Hills into PMD, city council members testified regarding their expressed viewpoint that the city did not want anything on Madero Hills. Once such a clear and "final signal" announcing the views of the City of El Paso towards further development on Madero Hills had been received, further development efforts by Petitioners would have been futile.⁵⁶ The law does not require a litigant to do a vain or useless thing.⁵⁷

There is no need to exhaust administrative remedies where the statute on its face cannot grant the relief requested.⁵⁸ The ZBA cannot grant a variance if the only hardship shown is financial.⁵⁹ Additionally, there is no authority for the ZBA to grant a bulk variance for a whole development, a concept which has been referred to as "de facto rezoning."⁶⁰

56. In *Hoehne v. County of San Benito*, 870 F.2d 529, 535 (9th Cir. 1989), the Ninth Circuit expressly found futility based upon, as is the case in the instant action, testimony regarding the attitude of zoning authorities against further development as well as rezoning in response to development applications. The appellate court decision in this case is in conflict with *Hoehne* as well as this Court's pragmatic approach regarding ripeness and futility.

57. *Dahl v. City of Palo Alto*, 372 F.Supp. 647, 649 (N.D. Calif. 1974).

58. See *Weinberger v. Weisenfeld*, 420 U.S. 636, 641, 95 S. Ct. 1225, 1229-1230, 43 L.Ed.2d 514 (U.S. 1975); see also *Whitney Benefits, Inc. v. United States*, 926 F.2d 1169, 1172 (Fed. Cir. 1991).

59. See *Bat'tles v. Board of Adjustment*, 711 S.W.2d 297 (Tex. App.—Dallas 1986, no writ).

60. See *Feiler v. Fort Lee Board of Adjustment*, 573 A.2d 175 (N.J. Super. Ct. App. Div. 1990); see also *Giutini v. Aronow*, 459 N.Y.S.2d 117 (N.Y. App. Div. 1983); see also *Van Duesen v. Jackson*, 312 N.Y.S.2d 853 (N.Y. App. Div. 1970).

It is factually undisputed and unchallenged that the only hardship to Petitioners in including Madero Hills in the PMD zoning ordinance was financial. Such "hardship" does not empower the ZBA to grant any variance, consequently, seeking a variance from the ZBA would have been futile.

Additionally, the law in Texas is clear that only a city council is empowered to establish the density of a tract submitted to the municipality for subdivision. It is equally clear that El Paso, Texas, Ordinance §2.16.030 (variance power of ZBA) does not increase the power conferred upon the ZBA by the State of Texas to approve variances. Despite these restraints upon the power of the ZBA, the lower appellate court in the instant action would require Petitioners to apply to the ZBA for a variance. The ZBA can only grant a variance in exceptional cases and then only in such a manner as will be in harmony with the general purpose of the PMD zoning ordinance and in accordance with the general or specific rules contained within such ordinance.⁶¹ To permit a zoning board of adjustment to grant a variance increasing density is not in harmony with the general purpose of a zoning ordinance and would be an improper delegation of legislative authority in violation of Article 2 §1 of the Texas Constitution and Article 1 §1 of the United States Constitution.⁶² The granting of a variance to Petitioners for the development of Madero Hills would have been an improper delegation of legislative authority and therefor seeking such a variance a futile act.

61. See *Board of Adjustment v. Stovall*, 218 S.W.2d 286 (Tex. Civ. App.—Fort Worth 1949, no writ).

62. See U.S. Const. art. 1 § 1; Tex. Const. art. 2 § 1; see also *Stovall* at 288; *Harrington v. Board of Adjustment*, 124 S.W.2d 401 (Tex. Civ. App.—Amarillo 1939, writ ref'd).

CONCLUSION

No matter how temporary a taking may be, the Constitution requires that a property owner be compensated for such taking. This Court has ruled as unconstitutional the process in California restricting the remedy of property owners to merely seeking to invalidate a regulation. Such process has been referred to as a regulatory game in which the property owner never won. Even if the property owner was successful in invalidating the ordinance, the zoning authority could simply change the regulation, requiring the property owner to repeat the process, *ad infinitum*.⁶³

There is no difference between the regulatory game this Court held as unconstitutional in *First English* and that practiced by the City of El Paso in the instant action. The common factor to both is that no matter whether the regulation is invalidated or a variance obtained, the land owner has been unconstitutionally deprived of his property. The fact that a permanent taking may be transformed into a temporary one is irrelevant to the determination of whether a taking has occurred. Yet, without further guidance from this Court, the regulatory game declared unconstitutional in *First English* has endured. The names may have changed to "variance" and "lack of ripeness" but the process of denying property owners their Constitutional guaranteed rights repeats itself and will until this Court instructs otherwise. For all the reasons addressed in this petition, Petitioners respectfully request that their Petition for Writ of Certiorari be granted.

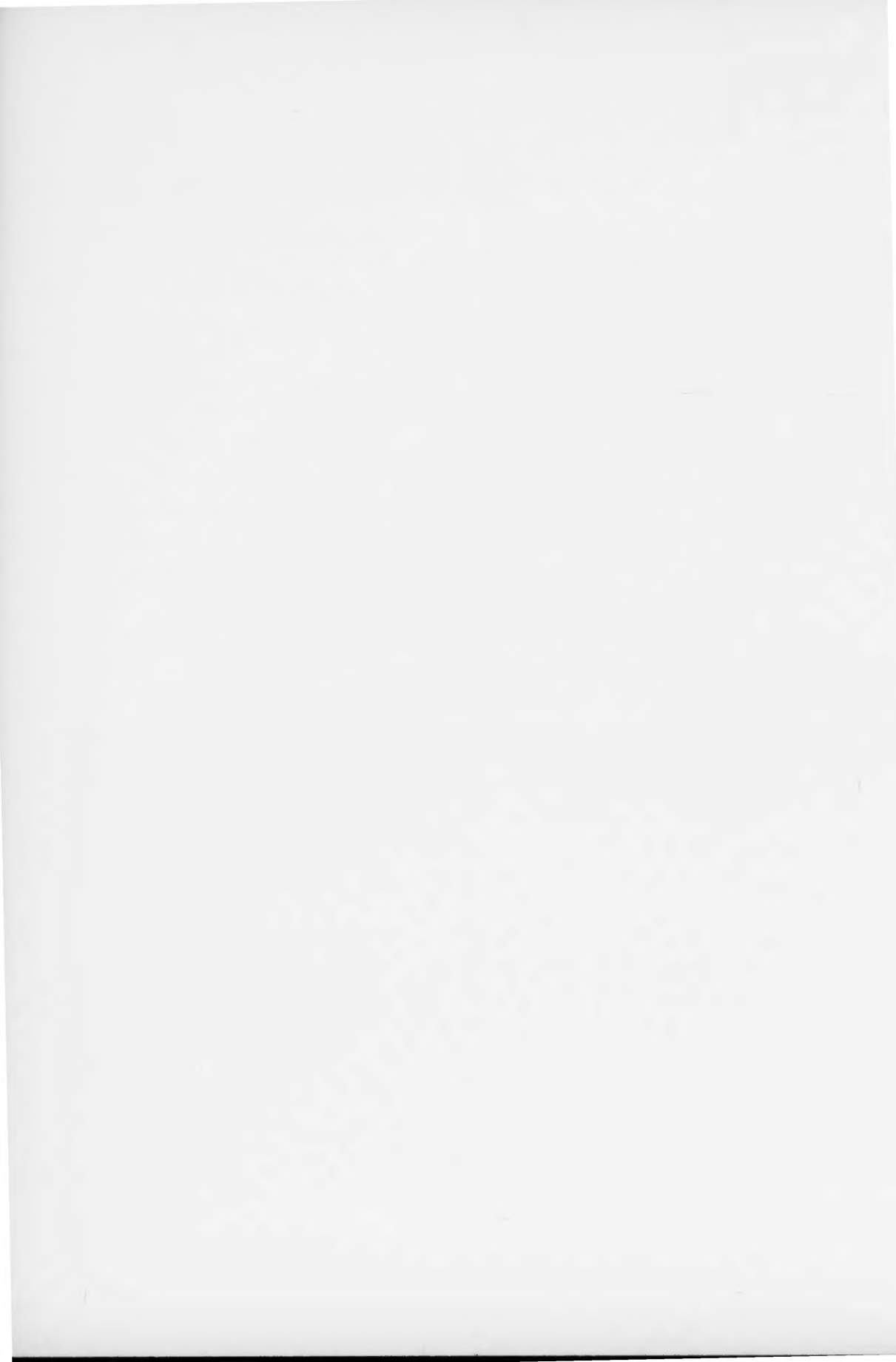
63. *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621, 655-56 n.22, 101 S. Ct. 1287, 67 L.Ed.2d 551 (U.S. 1981).

Respectfully submitted,

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APPENDIX A

**CITY OF EL PASO, Texas, a Municipal
Corporation and City Plan
Commission, El Paso, Appellants,**

v.

**MADERO DEVELOPMENT and Construction
Company, Inc., a Texas Corporation, and
Chaparral Equity Corporation,
a Texas Corporation, Appellees.**

NO. 08-89-00322-CV.

**Court of Appeals of Texas,
El Paso.**

January 4, 1991.

Rehearing Overruled January 30, 1991.

Landowners brought action against city and its planning commission, alleging inverse condemnation of property by rezoning. The 243rd District Court, El Paso County, Herb Marsh, J., entered judgment against city and planning commission, and they appealed. The Court of Appeals, Woodard, J., held that (1) landowner's action was not ripe, absent disclosure in record that landowner had applied for variances; (2) want of jurisdiction of subject matter of suit will arrest cause at any stage of proceedings, and it is not subject to waiver, and (3) futility doctrine did not provide exception to ripeness requirement.

Reversed and rendered; cause dismissed.

Fuller, J., filed concurring opinion.

Osborn, C.J., filed concurring and dissenting opinion.

Eduardo Mranda, Asst. City Atty., El Paso, Robert H. Freilich, Terry D. Morgan, Freilich, Leitner, Carlisle & Shortlidge, Kansas City, Mo., for appellants.

Alejandro Acosta, Jr., John S. Birkelback, Ginnings, Birkelbach, Keith & Delgado, El Paso, for appellees.

Before OSBORN, C.J., and FULLER and WOODARD, JJ.

OPINION

WOODARD, Justice.

This is an appeal from a \$871,200.00, plus interest, judgment against the City and its planning commission based upon inverse condemnation of property by rezoning. The jury established the amount of damages, and the trial court determined a "taking" as a matter of law. We reverse and render.

Point of Error No. One alleges the trial court erred in failing to apply the ripeness doctrine.

In September of 1980, the landowner filed its preliminary plat with the City Plan Commission. Phase One of the plan, consisting of 1.87 acres, received preliminary approval subject to various conditions in July, 1981. Phases Two, Three and Four, consisting of thirty-two acres, were approved likewise in December 1982 and

February 1984. Phase One was the only plan that received final approval, subject to certain conditions, and this was effected on December 1982 and February 1984. this was effected on December 2, 1982. In August of 1985 the landowner was notified by letter that there had been no activity on Phase One of the subdivision since the Plan Commission had approved it, and pursuant to the City's ordinance, "[f]ailure to submit the recording plat within one year from the date of the City Plan Commission approval of the final plat shall terminate all proceedings unless an extension of a specified amount of time is approved by the City Plan Commission." The letter further stated the subdivision file was officially closed.

In January of 1986, the land was rezoned for "Planned Mountain Development (PMD)" which entailed more restrictive use.

[1] A controversy in administrative law is "ripe" for the courts when it has "legally matured" within its province. The ripeness doctrine is to prevent the courts, by avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties, *Abbott Laboratories v. Gardner*, 387 U.S. 136, 87 S. Ct. 1507, 18 L.E.2d 681 (1967).

[2, 3] An administrative action must be final before it is judicially reviewable, *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S. Ct. 3108, 87 L.Ed.2d 126 (1985). The finality requirement is concerned with whether the initial decision maker has arrived at a definitive position

on the issue that inflicts an actual concrete injury. It is not the same as an exhaustion of remedy requirement that generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate. *Id.* "Although '[t]he question of what constitutes a "taking" for the purpose of the Fifth Amendment has proved to be a problem of considerable difficulty,' . . . among the factors of particular significance in the inquiry are the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations." Those factors simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question. *Id.*

[4] In this case, as in the *Williamson* case, the record does not disclose that the landowner has applied for variances to the zoning. It therefore, leaves open the possibility that it could develop the subdivision according to its plat, or if not according to its plat, with some compromise to its plat after obtaining certain variances and that this would give it reasonable beneficial use of its property. The fact that the City notified the landowner that the file was "officially closed" due to inactivity would not obviate this procedure. The "closing of a file," per se, does not indicate a definitive position on the constitutional issue that inflicts an actual, concrete injury, and any problems or prohibitions in relation to the reopening of the file have not been made a part of the issue in this case.

[5-8] Appellees contend the Appellants waived the "ripeness doctrine" as the Appellants made it their basis for a directed verdict when the Plaintiffs/Appellees rested their case, and then proceeded with their own evidence. *Jacobini v. Hall*, 719 S.W.2d 396 (Tex. App.—Fort Worth 1986, writ ref'd n.r.e.). The "Motion for Directed Verdict" clearly embodies the "ripeness doctrine" in its underlying grounds and ends with the following paragraph:

Defendants are entitled to an instructed verdict on each of Plaintiffs' claims. The evidence clearly shows that there is no question of fact to submit to a jury, and that the question of whether Defendants' conduct amounts to a taking within the terms of Texas Constitution Article I, Section 17, is a question of law which is premature and cannot yet be submitted to the court.

The motion, in essence, notifies the court that the Plaintiffs have not established the condition precedent to empower the court to proceed with the adjudication of the subject matter. It expressly requests a directed verdict, but inferentially urges abatement or dismissal for want of jurisdiction. A principal purpose of a pleading is to inform the court and the opposing party of the facts relied on and of the pleader's claims. It is to be "considered for all that it means instead of what is called," *Gratehouse v. Gratehouse*, 417 S.W.2d 592 (Tex. Civ. App.—Waco 1967, no writ); Tex. R. Civ. P. 71. Generally, there are three jurisdictional elements: (1) jurisdiction over the subject matter; (2) jurisdiction over the person or res; and (3) power to render the particular relief awarded. *Mobil Oil Corporation v. Matagorda County Drainage District No. 3*, 580 S.W.2d 684 (Tex.

Civ. App.—Corpus Christi 1979), *reversed on other grounds*, 597 S.W.2d 910 (Tex. 1980). Subject matter jurisdiction exists when the nature of the case falls within a general category of cases the court is empowered, under applicable statutory and constitutional provisions, to adjudicate. *Bullock v. Briggs*, 623 S.W.2d 508 (Tex. App.—Austin 1981, writ ref'd n.r.e.), *cert. denied*, 457 U.S. 1135, 102 S. Ct. 2962, 73 L.Ed.2d 1352 (1982). Jurisdiction of the subject matter is the power to deal with the general abstract question, to hear the particular facts in any case relating to this question and to determine whether or not they are sufficient to invoke the exercise of that power. *Brown v. French*, 413 S.W.2d 924 (Tex. Civ. App.—Amarillo), *reversed on other grounds*, 424 S.W.2d 893 (Tex. 1967). Want of jurisdiction of the subject matter of a suit will arrest a cause at any stage of the proceedings. *Southwestern Bell Telephone Company v. City of Kountze*, 548 S.W.2d 871 (Tex. Civ. App.—Beaumont 1976, no writ). It is not subject to waiver. *Armstrong v. West Texas Rig Company*, 339 S.W.2d 69 (Tex. Civ. App.—El Paso 1960, writ ref'd n.r.e.).

[9-13] The “ripeness doctrine” involves the issue of jurisdiction of the subject matter and power to render a particular relief. In *Williamson*, 473 U.S. at 200, 105 S. Ct. at 3123, 87 L.Ed.2d at 147, the Court stated “[i]n sum, respondent’s claim is *premature*, whether it is analyzed as a deprivation of property without due process under the Fourteenth Amendment, or as a taking under the Just Compensation Clause of the Fifth Amendment.” [Emphasis added]. In *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 840, 348, 106 S. Ct. 2561, 2566, 91 L.Ed.2d 285, 294 (1986), the Court

stated “[i]t follows from the nature of a regulatory takings claim that *an essential prerequisite to its assertion* is a final and authoritative determination of the type and intensity of development, legally permitted on the subject property.” [emphasis added]. By a “claim being premature,” there is no claim that the court has jurisdiction or power to adjudicate. By a claim having “an essential pre requisite to its assertion,” there is no claim that the court has jurisdiction or power to adjudicate until the essential prerequisite has been complied with. The “final determination” is a condition precedent to conferring jurisdiction to the trial court. There can be no “taking” by eminent domain until this condition is complied with. The burden of establishing jurisdiction, of proving a justiciable controversy, clearly falls on the moving party. *Reuter v. Cordes-Hendreks Coiffures, Inc.*, 422 S.W.2d 198 (Tex. Civ. App.—Houston [14th Dist.] 1967, no writ).

[14] Appellees attempt to invoke the “futility doctrine” as espoused in *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 106 S. Ct. 2561, 91 L.Ed.2d 285 (1986), as an exception to the “ripeness” requiremet. They claim that by the Appellants determining the slope of the area to be of forty-eight percent grade, the number of residential plots would be reduced from 150 to 11 plots under the PMD zoning, and according to their witnesses render the property valueless. They contend the Zoning Board of Adjustment had no authority to make variances not in keeping with the specific intent and extent of the PMD ordinance [*Board of Adjustment of the City of San Antonio v. Willie*, 511 S.W.2d 591 (Tex. Civ. App.—San Antonio 1974, writ ref’d n.r.e.)], and any request for them to do so would

be futile. This, therefore, would obviate the necessity of seeking a “final” determination. *El Paso, Tex., Ordinances* ch. 2.16 § 2.16.030 (1989) provides that the Board is empowered to authorize variances as will not be contrary to the public interest; and where a literal enforcement of the zoning laws, due to the nature of the property, would result in unnecessary hardship to an extent preventing any reasonable use of the property whatsoever, and so that the spirit of the zoning laws shall be observed and substantial justice done.

[15] It follows from the nature of a regulatory takings claim that an essential prerequisite to its assertion is a final and authoritative determination of the type and intensity of development legally permitted on the subject property. A court cannot determine whether a regulation has gone “too far” unless it knows how far the regulation goes. This is a question of degree—and therefore cannot be disposed of by general propositions. *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 106 S. Ct. 2561, 91 L.Ed.2d 285 (1986).

There is then, a question of degree in determining whether a particular variance would violate the spirit of the zoning laws. Some number of density of lots over eleven may or may not, and that must be determined by the Zoning Board of Adjustment acting within its guidelines. After this degree is attained the degree of taking can be arrived at. These degrees not only affect whether there is a taking but are relevant to the market value of the property for the purposes of establishing damages, if there is a taking.

[16] Appellees further attempt to invoke the futility doctrine by testimony that two of the city aldermen

stated words to the effect that they wished to impede the development of the property by zoning the property PMD. Therefore, it would be futile to attempt to obtain variances in view of the city's mind-set. Individual legislators are incompetent witnesses in regard to laws enacted because any law expresses the collective will of the legislative body and must be interpreted in that light. *Mayhew v. Town of Sunnyvale*, 774 S.W.2d 284 (Tex. App.—Dallas 1989, writ denied).

Point of Error Number One is sustained. Judgment of the trial court is reversed and the cause is dismissed for want of jurisdiction.

FULLER, Justice, concurring.

On February 1, 1989, the Appellants filed their Original Answer in which the City clearly stated that Appellees had not exhausted their administrative remedies because they had failed to pursue the acquisition of a variance or special exception from the Zoning Board of Adjustment for the City of El Paso. Further, such failure to exhaust their administrative remedies precluded Madero from seeking relief for a "taking" of property in the district court under Article I, § 17 of the Texas Constitution.

At the hearing on its Motion for Summary Judgment, the City clearly stated to the trial judge:

MR. CAYLOR: May it please the Court, the legal issue which is being brought to the Court this morning can be expressed in one word, "*ripeness*." The City's position with respect to that legal issue can be expressed in one sentence, and that is, that *this case is not ripe to be presented to this Court* because the City has never taken any final action under the ordinance which is being challenged by the Plaintiffs today.

On the Motion for Directed Verdict filed at close of Madero's case-in-chief, Appellants again clearly pointed out the contention of want or lack of jurisdiction of the trial court to proceed based on lack of ripeness of the controversy.

I agree that the trial court erred in proceeding to trial and entering judgment because the matter of "taking" simply was not "ripe" for judicial determination.

OSBORN, Chief Justice, concurring and dissenting.

I concur in part and respectfully dissent in part.

There can be no question that the ripeness doctrine, when properly raised, will prohibit the trial of issues such as are raised in this case. I concur with the majority opinion that there can be no trial on the merits where an administrative decision is not final and the case in effect is not ripe for trial of the issues in dispute.

My dissent concerns when and how that issue must be raised. In this case, there was nothing pending before any administrative board or commission at the time this case was tried. There was a procedure whereby a request could be made for a variance or change in administrative zoning orders. Any change in prior zoning provisions would necessarily change the use which could be made of the land in question. At the time of trial, the Appellees did not have pending any request for a variance. The Appellants in their answer alleged that the Appellees had not exhausted its administrative remedies. It did not file a plea in abatement which if granted would have avoided a trial at a time when it was contended the case was not ripe for trial on the merits.

The issue was raised again in a Motion for Summary Judgment. This is not an appeal from the granting of such

a motion, and the issues raised in a summary judgment hearing may not be raised again after a trial on the merits based upon the summary judgment order. *Ackermann v. Vordenbaum*, 403 S.W.2d 362 (Tex. 1966); *Note, Appeal and Error: Reviewability of Order Denying Motion for Summary Judgment After Trial on Merits*, 16 Okla. L.Rev. 335 (1963).

The ripeness doctrine was again raised in a Motion for Directed Verdict filed at the close of the Plaintiffs' case. The motion was overruled and another motion was not presented at the close of all the evidence. This resulted in the issues raised by the motion being waived for appellate review unless raised in some other manner. On this issue, the cases are legion. *Jacobini v. Hall*, 719 S.W.2d 396 (Tex. App.—Fort Worth, 1986, writ ref'd n.r.e.); *Shindler v. Marr & Associates*, 695 S.W.2d 699 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.); *Montgomery Ward & Company v. Garza*, 660 S.W. 619 (Tex. App.—Corpus Christi 1983, no writ); *Texas Steel Corporation v. Martinez*, 518 S.W.2d 264 (Tex. Civ. App.—Fort Worth 1976, writ ref'd n.r.e.); *Horizon Properties Company v. Douglas*, 588 S.W.2d 111 (Tex. Civ. App. App.—El Paso 1974, writ ref'd n.r.e.); 3 R. McDonald, *Texas Civil Practice* § 11.28 (1983).

If the ripeness doctrine is a jurisdictional issue, then this Court should not rely upon a Motion for Instructed Verdict or Motion for Summary Judgment as the basis for the issue having been raised. We should, sua sponte, determine that this court is without jurisdiction and dismiss the case. *Southwestern Bell Telephone Company v. City of Kountze*, 543 S.W.2d 871 (Tex Civ. App.—Beaumont 1976, no writ). That apparently is what the court has done without saying so.

I conclude, admittedly without a great deal of supporting authority, that the ripeness doctrine is not jurisdictional and is an issue that must be properly raised in the trial court or it is waived. In *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 106 S. Ct. 2561, 91 L.Ed.2d 285 (1986), the issue was raised in the trial court by a demurrer to the complaint. We have abolished the demurrer in Texas. I concluded that the issue should have been raised by a plea in abatement, and absent some procedure which properly raised the issue in the trial court, the ripeness doctrine was waived and should not be the basis for a reversal, sua sponte, after the basis for a reversal, sua sponte, after the case has been tried on the merits. Therefore, I dissent.

APPENDIX B

THE SUPREME COURT OF TEXAS

P. O. Box 12248
 Supreme Court Building
 Austin, Texas 78711

John T. Adams, Clerk

September 5, 1991

Mr. John S. Birkelbach
 Ginnings, Birkelbach,
 Keith & Delgado
 P. O. Box 54
 El Paso, TX 79940

Mr. R. Wayne Pritchard
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 City Attorney
 2 Civic Center Plaza,
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RE: Case No. D-0849

Style: MADERO DEVELOPMENT and CONSTRUCTION COMPANY, INC., a TEXAS CORPORATION, and CHAPARRAL EQUITY CORPORATION, a TEXAS CORPORATION v. CITY OF

EL PASO, TEXAS, a MUNICIPAL CORPORATION, and CITY PLAN COMMISSION, EL PASO

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioner's motion for rehearing of the application for writ of error in the above styled case.

Sincerely,

By: /s/ JOHN T. ADAMS, Clerk
COURTLAND CROCKER
Courtland Crocker, Deputy

APPENDIX C

NO. 89-443

IN THE DISTRICT COURT
OF EL PASO COUNTY, TEXAS
243RD JUDICIAL DISTRICT

MADERO DEVELOPMENT AND
CONSTRUCTION COMPANY, INC.,
a Texas Corporation, and
CHAPARRAL EQUITY CORPORATION,
a Texas Corporation,
Plaintiffs,

v.

CITY OF EL PASO, TEXAS, a
Municipal Corporation, and
CITY PLAN COMMISSION, EL PASO,
Defendants.

CORRECTED JUDGMENT

(Filed August 31, 1989)

On the 19th day of June, 1989, came on to be heard the above-entitled and numbered cause in which MADERO DEVELOPMENT AND CONSTRUCTION COMPANY, INC. and CHAPARRAL EQUITY CORPORATION are the Plaintiffs, and the CITY OF EL PASO, TEXAS and CITY PLAN COMMISSION, EL PASO, are the Defendants. The parties appeared in person and by attorney of record and announced ready for trial. Having been previously demanded, a jury consisting of twelve (12) good and lawful jurors was duly empaneled and the case proceeded to trial.

At the conclusion of the evidence, the Court submitted the case to the jury by special questions. The Charge of the Court, including the special questions, and the verdict of the jury are incorporated herein for all purposes. The jury found as follows:

QUESTION NO. 1

Do you find from a preponderance of the evidence that in applying the PMD zoning ordinance to Plaintiff's Madero Hills property, the City has "taken" Plaintiff's Madero Hills property?

Answer: "We do" or "we do not"

ANSWER: We do.

QUESTION NO. 2

What do you find to be the difference in the market value, if any, of Plaintiffs Madero Hills property immediately prior to the inclusion of Madero Hills into the PMD zoning ordinance and immediately after the inclusion of Madero Hills into the PMD zoning ordinance?

Answer in dollars and cents, if any.

ANSWER: \$871,200.

The Court, after hearing all the evidence and arguments, finds as an independent conclusion and as a matter of law, that the City's application of the PMD zoning ordinance to Madero Hill's property resulted in a taking of the property for which Plaintiffs must be compensated.

In regard to the word "Plaintiff's" as it was typed in Question One, and word "Plaintiffs" as typed in Question Two, the Court finds, after considering the charge, the pleadings, the evidence and the record, that

the intention of the verdict is to be ascertained and construed as a verdict taken by both Plaintiffs against both Defendants.

Judgment therefore is rendered upon the verdict in favor of the Plaintiffs and against the Defendants.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED that Plaintiffs have and recover judgment from and against Defendants, jointly and severally, in the amount of Eight Hundred Seventy One Thousand Two Hundred Dollars (\$871,200.00), plus pre-judgment interest from December 2, 1986 to August 30, 1989 of Two Hundred Thirty Eight Thousand Nine Hundred Twenty-three Dollars (\$238,923.00), for a total of One Million One Hundred Ten Thousand One Hundred Two Dollars (\$1,110,123.00).

IT IS FURTHER ORDERED that the judgment hereby rendered shall bear interest at the rate of ten percent (10%), compounded annually, from August 31, 1989 until paid.

All costs of Court expended or incurred in this cause are hereby adjudged against CITY OF EL PASO and CITY PLAN COMMISSION, jointly and severally, Defendants. All writs and processes for the enforcement and collection of this judgment or the costs of court may issue as necessary. All other relief not expressly granted herein is denied.

SIGNED this 31st day of August, 1989.

By: /s/ (Signature Illigible)

JUDGE

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APPROVED AS FORM ONLY:

Eduardo Miranda

Attorney for Defendants

/s/ ALEJANDRO ACOSTA, JR.

Attorney for Plaintiffs

Date Entered of Record 8-31-89

Certified True and Correct

EDIE RUBALCABA,

District Clerk,

El Paso, Texas

By: _____

APPENDIX D

008226

AN ORDINANCE AMENDING CHAPTER 25
(ZONING) OF THE EL PASO CITY CODE,
THE PENALTY BEING AS PROVIDED IN
SECTION 25-96 OF THE CODE

BE IT ORDAINED BY THE CITY COUNCIL OF
THE CITY OF EL PASO, TEXAS:

1. That Section 25-24 RMD Residential Mountain District of the El Paso City Code (Zoning) shall be and is hereby amended to read as follow:

"Sec. 25-24. PMD Planned Mountain Development District

25-24.1 *Purpose of the district.* The purpose of this district is to promote the following city objectives:

- (1) To protect significant natural features of the mountain development area and preserve the City's unique visual setting as part of the comprehensive plan.
- (2) To provide an alternative approach to conventional flatland development by allowing transfer of residential densities through clustering of dwellings in order to preserve larger areas of open space.
- (3) To minimize scarring and disturbances of the natural character of the mountain development area through control of grading and cut/fill operations as defined in the Grading Ordinance.
- (4) To control water runoff and soil erosion.
- (5) To provide a safe means of ingress and egress for vehicular and pedestrian traffic to and within the mountain development area.

- (6) To encourage sound engineering practices related to mountain development.

25-24.2 *Minimum district area.* The minimum area for a planned mountain development district where common or public open space is to be provided shall be three (3) acres. Extensions to the original district, from a common boundary, may be considered in increments of less than three (3) acres provided that all other requirements are observed. Where buildable areas and private open space are provided on each lot the three (3) acre minimum requirement does not apply and the provisions of section 25-24.9 shall be met.

25-24.3 *Ownership control.* Where required, the common open space shall be owned by an incorporated or unincorporated association to assure that it will be permanently maintained in its natural state. Open space may be made public if dedicated or transferred in trust to the City and the city council accepts such dedication or transfer without affecting any other provision of this ordinance.

25-24.4 *Permitted uses.*

- (1) Detached single-family dwelling.
- (2) Two-family dwelling, attached single-family dwelling (including condominiums) and multi-family dwellings.
- (3) Publicly owned park, parkway, playground, hiking trail, recreation facility.
- (4) Public and private school accredited by the State of Texas to give elementary and high school training.
- (5) Church.
- (6) Facilities and structures necessary for rendering public utility service.

- (7) Neighborhood recreational facilities, open or enclosed, such as swimming pools, tennis courts, other playing surfaces, picnic areas, or other recreational areas, including necessary accessory facilities such as bath houses, sun or rain shelters, storage buildings, and parking areas, for the exclusive use of members of and to be operated and managed by a non-profit neighborhood organization, neighborhood association or similar type of neighborhood group.

25-24.5 *Permitted accessory uses.* Permitted uses in accordance with Section 25-24.4 may also have the following accessory uses.

- (1) Building for domestic storage.
- (2) Garage, private.
- (3) Garden house, toolhouse, playhouse or greenhouse incidental to residential uses.
- (4) Home occupation as defined in this Code.
- (5) Swimming pool and game court, for use of occupants.
- (6) Signs as regulated in Section 25-24.6.
- (7) Keeping of animals for personal use or enjoyment and not as a business, when in compliance with Chapter 5 of the El Paso City Code.
- (8) Temporary buildings, or structures, including relocatable office or storage units, the uses of which are incidental to construction operations during development being conducted on the same lot or subdivision and which shall be removed upon completion or abandonment of such construction, or upon the expiration of a period of two (2) years, whichever is sooner.
- (9) Temporary buildings or structures, including a relocatable office unit for use as a sales or

rental office for an approved real estate development or subdivision, located on the same lot as said real estate development or subdivision and which shall be removed upon completion or abandonment date of the two (2) years, whichever is sooner.

- (10) Yard sale or garage sale for disposal of used household items, provided such sales are not held more frequently than once a year on the same lot, are not conducted for more than two (2) days, and include items assembled only from households in the immediate neighborhood.
- (11) Off-street parking and loading spaces.
- (12) Residential type television or radio receiving antennas, roof-mounted, and not exceeding five (5) feet in height above the highest point in the roof.
- (13) Federally licensed amateur and CB radio stations complying with FCC regulations. Installation of radio towers and mast shall require approval of the building official to certify compliance with the building code of the City of El Paso.
- (14) Satellite receiving dishes and other satellite receiving antennas conforming with Section 25-64.3 (10).
- (15) Accessory uses as follows in attached single family developments or multi-family developments where permitted by special permit:
 - (a) An office located in a main building for administration of a development containing (10) or more dwelling units.
 - (b) A laundry room for use of occupants of a development.

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- (c) A sauna or exercise room or similar facility for use of occupants of a development.
 - (d) Coin-operated vending machines for candy, tobacco, ice, soft drinks and sundries, inside a building.
- (16) Maintenance facilities for permitted uses.

25-24.6 *Signs*. Signs may be placed on a building or land subject to the general sign regulations of Section 25-62.

25-24.7 *Uses permitted by special permit*. The following uses may be permitted by special permit, if approved by the city council, with or without conditions, following a recommendation by the city plan commission, in accordance with the procedure, guides, and standards of section 25-83. These uses may be permitted concurrently with the establishment of a PMD District subject to all of the procedural requirements of a special permit.

- (1) Resort lodge.
- (2) Art galleries, museums, libraries and other similar philanthropic institutions.
- (3) Dude ranch.
- (4) Golf course on a site with a slope less than 15%.
- (5) Tennis clubs, with game courts and swimming pools for use of occupants or their guests in accordance with the conditions stated in Section 25-63.
- (6) Private clubs requiring a liquor district in conjunction with a golf course or tennis club.
- (7) Convalescent, nursing or rest homes.

- (8) Personal care homes providing that the facility cares for no more than 7 recipients and that it is in accordance with Section 25-63.14.
- (9) Retail shopping facilities occupying an area of two (2) acres or less.
- (10) Church on a site less than (3) acres.
- (11) Theatre—indoor or open air.
- (12) Picnic areas.
- (13) Major facilities for generation of energy, water treatment plants, commercial and public radio television broadcasting and microwave receiving facilities, storage yards for public utilities and similar uses.
- (14) Public or governmental buildings and uses.
- (15) Wind-driven electric generation or wind driven pumps complying with the provisions of Section 25-63.12.

25-24.8 *Common or public open space and related lot size standards.* Where common or public open space is provided in the Planned Mountain Development District, the common or public open space shall be shown on the required site plan and subdivision plat. To retain the significant natural features of the mountain development area, the common or public open space increases and densities decrease as the slope of the terrain increases. When a proposed development containing common or public open space is to be accomplished in phases, the initial phase which is platted shall contain a minimum of three (3) acres and each phase shall individually maintain the common or public open space required. The following standards for single-family detached dwellings, two-family dwellings, single-family attached dwellings and multi-family dwellings shall be observed:

25a

(1) Common or public open space required and density limitations.

- (a) Where the required minimum common or public open space is provided given the slope of the terrain, the maximum dwelling units permitted per gross acre shall be as follows:

Percent Slope	Maximum Density Per Gross Acre	Minimum Common or Public Open Space or Percent of Site to Remain in Natural State
0 - 5	20	5.50
4 - 10	25	5.00
10 - 15	30	4.50
15 - 20	40	3.75
20 - 25	45	3.00
25 - 30	50	2.25
30 - 35	55	1.25
35 - 40	60	.75
over 40	65	.25

(2) Minimum lot areas.

	Minimum Lot Area in Square Feet
(a) Single-family detached dwelling	5,000
(b) Single-family attached dwelling	3,000
(c) Two-family dwelling	6,000
(d) Multi-family dwelling	none
(e) Church	3 acres

25-24.9 *Buildable area and related lot size standards.*
Buildable areas for single-family detached dwellings,

where private open space is provided in lieu of common or public open space, shall comply with the standards contained in the following table. To retain the significant natural features of the mountain development area, densities decrease as slope of the terrain increases.

Percent Lot Slope	Minimum Lot Area (sq. ft.)	Minimum Width (feet)	Minimum Depth (feet)	Maximum Buildable Area in Percent of Lot Area
0 - 5	6,000	60	90	80
5 - 10	8,000	70	100	75
10 - 15	10,000	75	110	70
15 - 20	12,000	80	110	60
20 - 25	16,000	100	120	55
25 - 30	20,000	125	150	50
30 - 35	24,000	130	170	45
35 - 40	1 acre	175	190	40
over 40	2 acres	230	270	30

25-24.10 *Private and common or public open space.* Where a minimum of twenty (20) percent of the gross area of a site is designated as common or public open space in addition to complying with section 25-24.9, the minimum lot standards pertaining to the lower percent slope shown for the line immediately above the one indicating the slope of the site shall apply.

25-24.11 *Yard and set back standards.*

- (1) A minimum distance of ten (10) feet between detached structures, plus two (2) additional feet of separation for each additional story over two (2).
- (2) A minimum ten-foot setback for all structures abutting platted public or private right-of-way,

except that garages or carports perpendicular to any right-of-way shall have a minimum twenty-foot setback.

- (3) Buildable areas, where required, shall be shown on the site plan and subdivision plat and deeds and covenants must reflect that structures, walls, or service areas will be within the buildable areas.
- (4) Where a site plan is not required for detached single-family dwellings pursuant to Section 25-24.13 (2), the following minimum yard requirements shall be observed:
 - (a) 10' front yard
 - (b) 10' rear yard
 - (c) 5' side yard
 - (d) 10' side yard abutting a side street

25-24.12 *Height standards.* The height of each building or structure shall not exceed two and one half (2½) stories or thirty-five (35) feet, measured from the lowest living area floor level and shall not exceed thirty-five (35) feet from the highest elevation of the lot, except that the city plan commission may recommend and the city council may approve height limits in excess of those mentioned above where it can be demonstrated that the additional height will not have a detrimental effect on surrounding land uses.

25-14.13 *Property development standards.* The following property development standards shall apply to all land, buildings and structures within the PMD.

- (1) Subdivision plat. Buildings and structures in the PMD shall be erected only on land where a plat or replat has been approved by the city plan commission, filed of record in accordance with Ordinance No. 7714, and indicates compliance with the provisions of this section. Each

attached or detached single-family dwelling must be platted on an individual lot prior to issuance of occupancy permits.

- (2) Site plan. Where the minimum yard standards of section 25-24.11 (4) are observed, detached single-family dwellings shall not require a site plan. Under all other conditions, a site plan complying with all of the requirements of section 25-82 is required for all property within the PMD. No building permit shall be issued until the site plan is approved by city council. If the development is to be undertaken in a series of phases, a development schedule indicating phasing shall be submitted concurrently with the site plan required by section 25-82.
- (3) Common or public open space. Where required, the total amount and distribution of common or public open space shall be shown on the site plan and subdivision plat and shall be expressed as the percent of the site which will remain in its natural state. Satisfactory provisions for assuring continued retention of the common or public open space shall be provided in accordance with the procedures set forth in section 25-67.
- (4) Percent slope. The percent slope of the proposed planned mountain development used to determine the common open space shall be shown on the required site plan and subdivision plat.
- (5) Perimeter treatment. The perimeter treatment of the proposed planned mountain development shall be designed to insure compatibility with adjacent existing or potential development by provision of compatible land uses and structures. A minimum setback of ten (10) of separation for each story or fraction thereof

shall be maintained between any structure and the outside boundary of the proposed planned mountain development.

- (6) Private streets. Where authorized by the city plan commission in approving a subdivision plat, streets may be privately owned.
- (7) Preservation of the environment. In all planned mountain developments, existing vegetation, animal life, arroyos, flood prone areas, steep slopes, and other natural features shall be considered in the planning, design and layout of
- (8) Right-of-way and pavement widths. The right-of-way and pavement widths for internal ways, streets and alleys within and adjacent to the proposed planned mountain development shall be:
 - (a) determined from the standards contained in Subdivision Ordinance No. 7714 and any applicable ordinance governing private streets.
 - (b) in conformity with the estimated needs of the entire planned mountain development and the traffic to be generated thereby.
 - (c) adequate and sufficient in size, location and design to accommodate the maximum traffic, parking, loading needs and the access for fire-fighting equipment vehicles while preventing undue scarring and grading.
- (9) Off-street parking and loading. The minimum requirements for off-street parking and loading set forth in sections.
- (10) Utilities and public services. Every planned mountain development shall be adequately

served by essential utilities and public services such as water, sanitary sewer, storm drainage, police, fire and other similar services.

25-24.14 *Property grading standards.* Grading in the PMD must be in accordance with Chapter 11A (Grading Ordinance) of the El Paso City Code.

25-24.15 *Work standards for construction.*

- (1) Utility service facilities shall be placed underground and wherever practical shall lie within street right-of-way.
- (2) Disturbed soil surfaces shall be stabilized by compaction and revegetation where practical to minimize blowing dust, landslides, falling rocks, debris and excessive water runoff.
- (3) Any person performing grading or excavation operations shall take precautions to minimize erosion, protect any water-ways or arroyos and other natural features and to protect the health, safety and welfare of persons and public and private property from damage.
- (4) All developers or property owners shall be responsible for storage and hauling of loose dirt, debris, etc., resulting from the proposed planned mountain development to an approved location for disposal.
- (5) The drainage plan, prepared by a professional engineer registered in the State of Texas, which takes into consideration the health, safety and general welfare of all persons and property within and adjacent to the proposed planned mountain development, adjacent arroyos, channels, and any other collection systems which lie between the proposed development and approved drainage collection basins, shall be carried out as required by the Subdivision Ordinance.

- (6) Sand and gravel extraction, borrow pits, quarrying, rock crushing and any other processing of earthen material is expressly prohibited, except that such activities may be permitted when conducted as an incidental use in preparing a site for uses otherwise permitted by Sections 25-24.4 and 25-24.7 and when¹ conducted in accordance with an approved site plan.

25-24.16 *Environmental assessment*

- (1) To ascertain how the proposed development will affect the site and adjacent areas, an environmental assessment may be required by the city plan commission and approved by the city council in conjunction with the subdivision plat required by section 25-24.13. The assessment shall be prepared in accordance with the environmental guide published by the department of planning, research and development of the City of El Paso, Texas on March 24, 1983 and as may subsequently be revised.
- (2) If the city council finds after a recommendation of the city plan commission and the El Paso Mountain Committee, that there is evidence of an adverse effect upon the environment as expressed in the environmental assessment or as determined at the public hearing, the city council may approve specific modifications to the site plan which lessen or eliminate the adverse effects."

2. That Section 25-6 of the El Paso City Code (Zoning) shall be and is hereby amended by adding the following:

"Acreage, Gross: The total area of a proposed development, within a planned mountain development district, shown on the original subdivision plat or site plan submitted.

Open space, private: The part of a lot owned by a person or entity in a planned mountain development specifically designated as open area to remain undisturbed in its natural state.

Open space, public: The land dedicated to and accepted by the City of El Paso in a planned mountain development specifically designated as open area to remain undisturbed in its natural state.

Slope, percent of: The percent average slope shall be determined by using the following equation:

$$S = \frac{.0023 \text{ IL}}{\text{A}}$$

S = average slope, percent
 I = contour interval in feet
 L = contour length in feet
 "A = parcel area in acres"

3. That Section 25-6 of the El Paso City Code (Zoning) shall be and is hereby amended by changing the following definitions to read as follows:

"Dwelling, multi-family: A building, or portion thereof, designed or used for occupancy by two (2) or more families, all living independently of each other in separate dwelling units.

Dwelling, attached single-family: A row or group of two (2) or more adjoining dwelling units each of which is separated from the others by a common property line.

Open space, common use: Land owned by an incorporated or unincorporated association in a planned residential or planned mountain development, specifically developed for common recreational areas, designated as open area for the use and enjoyment of all the owners of the development or in the planned mountain development district as land to remain undisturbed in its natural state, except for golf courses where allowed under Section

25-24.7; does not include streets, drives and alleys, private yards and patios of individual building sites or other areas designed primarily to serve other functions, such as parking or storage areas except for hiking trails and walking paths where approved by the city council."

Passed and approved this 4th day of December, 1984.

ATTEST:

(Signature Illegible)
City Clerk

APPROVED AS TO FORM:

(Signature Illegible)
City Attorney

APPROVED AS TO CONTENT:

(Signature Illegible)
Department of Planning, Research
and Development

(Signature Illegible)
Mayor

APPENDIX E**TEXAS LOCAL GOVERNMENT CODE****§ 211.009. Authority of Board**

(a) The board of adjustment may:

(1) hear and decide an appeal that alleges error in an order, requirement, decision or determination made by an administrative official in the enforcement of this subchapter or an ordinance adopted under this subchapter;

(2) hear and decide special exceptions to the terms of a zoning ordinance when the ordinance requires the board to do so; and

(3) authorize in specific cases a variance from the terms of a zoning ordinance if the variance is not contrary to the public interest and, due to special conditions, a literal enforcement of the ordinance would result in unnecessary hardship, and so that the spirit of the ordinance is observed and substantial justice is done.

(b) In exercising its authority under Subsection (a)(1), the board may reverse or affirm in whole or in part, or modify the administrative official's order, requirement, decision, or determination from which an appeal is taken and make the correct order, requirement, decisions, or determination, and for that purpose the board has the same authority as the administrative official.

(c) The concurring vote of four members of the board is necessary to:

35a

(1) reverse an order, requirement, decision, or determination of an administrative official;

(2) decide in favor of an applicant on a matter on which the board is required to pass under a zoning ordinance; or

(3) authorize a variation from the terms of a zoning ordinance.